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FAU EN JI v. KETUA PENGARAH JABATAN PENDAFTARAN NEGARA

HIGH COURT MALAYA, KUALA LUMPUR
ZALEHA YUSOF J
[JUDICIAL REVIEW NO: 25-203-10-2013]
B 9 SEPTEMBER 2014

CIVIL PROCEDURE: *Declaration – Gender declaration – Application for – Change of name and gender on identity card – Factors considered – Medical reports failed to give evidence pertaining to chromosomal and genital factors – Whether* C *psychological and gonodal factors sufficient to assess applicant's sexual condition – Whether sex reassignment surgery changes a person's gender to warrant change of gender description in identity card – Whether applicant complied with test stipulated in Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara – Whether National Registration Department acted with procedural impropriety and* D *mala fide when rejecting application*

The applicant, who was born a female, had undergone some medical surgical procedures at the Yanhee International Hospital, Thailand for the purpose of changing her sex from female to male. Subsequently, the applicant made an application for change of name and gender to the respondent and submitted E medical reports from Thai surgeons and three Malaysian doctors as supporting documents. The respondent rejected the said application based on the decision made by the "Panel Pindaan Butiran Kad Pengenalan". Aggrieved, the applicant filed this application for a judicial review, seeking *inter alia*, the following prayers (i) a declaration that the applicant was legally F male; (ii) an order of *certiorari* to quash the decision made by the respondent; (iii) an order of *mandamus* that the respondent amend the applicant's name from Fau En Ji to Kelvin Fau and (iv) an order of *mandamus* that the respondent amend the detail of the applicant's gender from female to male. The issue that arose was whether the respondent had acted reasonably, G legally and rationally, without procedural impropriety and *mala fide*; in rejecting the applicant's application for change of name and gender.

Held (dismissing application with costs):

(1) A declaration that a person is currently of a gender other than that such person was born as was not a simple issue (*Kristie Chan v. Ketua Pengarah* H *Jabatan Pendaftaran Negara*, refd). Gender is a multi-faceted question. It does not involve the desire of the applicant alone, but involves consideration of chromosomal, gonodal, genital and psychological factors. (para 7)

I **(2)** A scrutiny of the medical reports submitted showed that none of the medical officers had given evidence pertaining to the chromosomal factor. It covered only the gonodal factors. None of the medical officers gave evidence pertaining to the genital factor which involves internal sex

organs and functions. The medical officers did not give evidence pertaining to what could be defined as gender as a female and as a male or to what are the characteristics of a male and a female. Psychological factor alone or gonodal factors were not sufficient to assess the applicant's sexual condition. (paras 12 & 13)

(3) The medical officers failed to give evidence pertaining to whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card, based on the requirements laid out in case law. The applicant had failed to comply with the test as stipulated in *Kristie Chan*. Paragraph 5.7.1 of Arahan Jabatan Pendaftaran Negara Bil. 9/2007 dated 21 August also provides that amendment of a sexual gender on an identity card was not allowed unless ordered by the court. The directions issued reflects the policy of the National Registration Department; hence it was binding and must be adhered to (*Lina Joy v. Majlis Agama Islam Wilayah Persekutuan Dan Lain-Lain* (refd). (paras 12, 15, 16 & 17)

(4) The applicant should have filed for the originating summons for the declaration sought before applying for the change in the identity card. The issue of whether the applicant was a male or remains a female was a complex issue and need to be proven by witnesses. Being a complex issue, it was only prudent for the National Registration Department to impose such condition. There was no error on the part of the respondent in rejecting the applicant's application. The respondent had acted reasonably legally and rationally, without procedural impropriety and *mala fide*; in rejecting the applicant's application for change of name and gender. (paras 18 & 19)

Case(s) referred to:
Bellinger V Bellinger [2003] UKHL 21 ***(refd)***
Corbett v. Corbett [1971] P 83 ***(refd)***
Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara [2013] 4 CLJ 627 CA ***(refd)***
Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Lain-Lain [2007] 3 CLJ 557 FC ***(refd)***

For the applicant - Choong Joo Tian; M/s JT Chong Assocs
For the respondent - Maisarah Juhari; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Zaleha Yusof J:

[1] The applicant, who was born a female on 21 October 1989, had undergone some medical surgical procedures at the Yanhee International Hospital, Thailand between the year 2011 to 2012 for the purpose of changing her sex from female to male.

[2] At the Yanhee International Hospital, the applicant was treated by the following medical doctors and surgeons:

(i) Dr Thawatchai Boonpadhanapon, a plastic surgeon from the Plastic Surgery Department;

(ii) Dr Amnat Techowanich, a surgeon from the OB-GYN Department;

(iii) Dr Ajchara Roumcharoenkiat, a psychiatrist from the Psychiatry Department; and

(iv) Dr Sukit Worathamrong, a certified plastic and reconstructive surgeon from the same hospital.

[3] Upon completion of the surgical procedures in Thailand, the applicant went for further medical checkup with three medical professionals practicing in Malaysia, that is:

(i) Dr Wong Kok Kien, a Consultant Obstetrician and Gynaecologist from Gleneagles Hospital Kuala Lumpur;

(ii) Dr Kenneth Koh Beng Hock, a Consultant Urologist from Pantai Hospital Kuala Lumpur; and

(iii) Dr Bharathi S Vengadasalam, a Consultant Psychiatrist from Pantai Hospital Kuala Lumpur

[4] On 19 August 2013, the applicant made an application for change of name and gender to the respondent and enclosing the medical reports from the Thai surgeons and the three Malaysian doctors as supporting documents. By a letter dated 2 September 2013, the respondent informed the applicant that the application for change of name and gender was rejected and that the rejection was based on the decision made by the "Panel Pindaan Butiran Kad Pengenalan" on 29 August 2013.

[5] Aggrieved, the applicant filed this application for a judicial review, seeking *inter alia*, the following prayers:

(i) Declaration that the applicant is legally male;

(ii) An order of *certiorari* to quash the decision made by the respondent dated 2 September 2013;

(iii) An order of *mandamus* that the respondent amends the applicant's name from Fau En Ji to Kelvin Fau; and

(iv) An order of *mandamus* that the respondent to amend the detail of the applicant's gender from female to male and to change the last digit in the applicant's identification number from an even number to an odd number.

Issue

[6] Whether the respondent had acted reasonably, legally and rationally, without procedural impropriety and *mala fide*; in rejecting the applicant's application for change of name and gender.

Decision

[7] The Court of Appeal in *Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara* [2013] 4 CLJ 627 had admitted that a declaration that a person is currently of a gender other than that such person was born as, is not a simple issue. After citing with approval the cases of *Bellinger v. Bellinger* [2003] UKHL 21 and *Corbett v. Corbett* [1971] P 83, the Court of Appeal concluded that these cases serve to show gender is a multi-faceted question. And not involving the desire of the applicant alone, but involve consideration of chromosomal gonodal, genital and psychological factors.

[8] I have scrutinised medical reports submitted by the applicant as shown in encl. 3. The relevant ones are found in exh. A5, A6, A7, A8, A9 and A11. Exhibit A5 was signed by Dr Thawatchai Boonpadhanapon, Dr Amnat Techowanich and Dr Ajchara Roumcharoenkiat. It merely states that mastectomy to remove breasts and hysterectomy to remove the applicant's uterus were done. This only covers the gonodal factor of a female.

[9] Exhibit A6 is by Dr Sukit Worathamrong. He confirmed that all female sex organs of the applicant, had been removed (removal of gonodal factor of a female) and that urethra, penis and all male sex organs structures had been reconstructed (gonodal male factor). With that he concluded that the applicant could now "be classified as male identity", and expect the applicant "to have a better lifestyle physically and psychologically".

[10] Exhibit A7 is a letter by Dr Wong Kok Kie. He noted the evidence of removal of female organ and of the presence of a well constructed penis and scrotum. This covers the male gonodal factors. Exhibit A8 is a short report by Dr Kenneth Koh who found the applicant to be on male hormone replacement therapy and had a deep voice, prominent larynx and male distribution of body hair. This only covers the male gonodal factors.

[11] Exhibit A9 by Dr Bharathi S Vengadasalam merely confirms that the applicant was receiving male hormone and upon physical examination found the applicant to have male character and male organ. This covers the male gonodal factors. Exhibit A11 is also by Dr Bharathi S Vengadasalam. He opined that the applicant fulfilled the criteria for Gender Dysphoria and concurred with the finding of Dr Kenneth Koh and Dr Wong Kok Kien.

[12] Based on the above medical reports, I totally agree with the respondent's argument that:

(a) None of the medical officers gave evidence pertaining to the chromosomal factor;

A (b) None of the medical officers gave evidence pertaining to the genital factor which involves internal sex organs and functions,

(c) None of the medical officer gave evidence pertaining to what can be defined as gender as a female and as a male.

B (d) None of the medical officers gave evidence pertaining to what are the characteristic of a male and a female (generally); and

(e) None of the medical officers gave evidence pertaining to whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card, based on the C requirements laid out in case law.

[13] Learned counsel for the applicant has argued that there is a clear departure from *Corbett (supra)* and *Bellinger (supra)* in that the Court of Appeal, in *Kristie Chan (supra)* was prepared to consider and take into account the psychological factor (in additional to the three biological factors) in D determining the gender of the applicant. With due respect, the *Corbett (supra)* which was followed by *Bellinger (supra)* did not confine only to the three biological factors. As Ormrod J in *Corbett (supra)* had stated:

> ... there are at least, four criteria for assessing the sexual condition of an individual. These are: E
>
> i. Chromosomal factors;
>
> ii. Gonodal factors (ie, presence or absence of testes or ovaries).
>
> iii. Genital factors (including internal sex organs).
>
> iv. Psychological factors. F

Hence, I opine, psychological factor alone or gonodal factors are not sufficient to assess the applicant's sexual condition.

[14] In *Bellinger (supra)*, the central issue is "whether can a person change the sex with which she or he is born with? The House of Lords refused to G make a decision that Mrs Bellinger was correctly classified and registered as "male" at birth. Despite the operation conducted to reassign the gender, Lord Nicholls Birkenhead at para. [28] had stated:

> The distinction between male and female exists throughout the animal world. It corresponds to the different roles played in the reproductive H process. A male produces sperm which fertilise the female's eggs. In this country, as elsewhere, classification of a person as male or female has long conferred a legal status. It confers a legal status, in that legal as well as practical consequences follow from the recognition of a person as male or female. The legal consequences affect many areas of life, from marriage and family law to gender-specific crime and competitive sport. It is not I surprising, therefore, that society through its laws decides what objective biological criteria should be applied when categorising a person as male or female. Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable.

That would make nonsense of the underlying biological basis of the distinction.

At para. 40 onwards, His Lordship had added:

I do not consider this would be a proper or, indeed, a responsible basis on which to change the law. Surgical intervention takes many forms and, for a variety of reasons, is undertaken by different people to different extents. For men it may mean castration or inversion of the penis to create a false vagina. For women it may mean a mastectomy, hysterectomy, or creation of a false penis by phalloplasty. There seems to be no 'standard' operation or recognised definition of the outcome of completed surgery. Today the case before the House concerns Mrs Bellinger. Tomorrow's case in the High Court will relate to a transsexual person who has been able to undergo a less extensive course of surgery. The following week will be the case of a transsexual person who has undergone hormonal treatment but who, for medical reasons, has not been able to undergo any surgery. Then there will be a transsexual person who is medically able to undergo all or part of the surgery but who does not wish to do so. By what criteria are cases such as these to be decided?

[41] But the problem is more fundamental than this. It is questionable whether the successful completion of some sort of surgical intervention should be an essential prerequisite to the recognition of gender reassignment. If it were, individuals may find themselves coerced into major surgical operations they otherwise would not have. But the aim of the surgery is to make the individual feel more comfortable with his or her body, not to 'turn a man into a woman' or *vice versa*.

[15] From the cause papers before me, I am satisfied that the applicant has failed to comply with the test as stipulated by the Court of Appeal in *Kristie Chan (supra)*. Attention must also be drawn to the Hansard of House of Representatives dated 6 December 2004 which *inter alia* stated as follows:

maka keterangan jantina yang diberikan adalah berdasarkan kepada pengesahan permohonan atau pengawai perubatan ketika kanak-kanak tersebut dilahirkan. Percanggahan atau kesilapan mengenai jantina tidak mungkin berlaku dan walau bagaimanapun Akta Pendaftaran Kelahiran dan Kematian membenarkan supaya pindaan dilakukan jika berlakunya kesilapan teknikal semasa pendaftaran dan kelahiran tersebut dilakukan.

...

Berhubung dokumen kad pengenalan yang juga mencatatkan jantina di dalam dokumen tersebut, pindaan maklumat di dalam kad pengenalan adalah diperuntukkan pada peraturan-peraturan pendaftaran negara yang sedia ada. Kesimpulannya, pertukaran jantina yang dilakukan melalui teknologi perubatan perlulah dikaji dengan teliti kerana ia akan memberi impak yang besar kepada struktur sosio masyarakat negara ini, undang-undang dan hukum agama yang terdapat di negara kita.

[16] I also note that para. 5.7.1 of Arahan Jabatan Pendaftaran Negara Bil. 9/2007 dated 21 August 2007 provides as follows:

> 5.7.1 Pindaan jantina dalam kad pengenalan adalah tidak dibenarkan kecuali atas perintah Mahkamah.

[17] The directions issued reflects the policy of the National Registration Department; hence it is binding and must be adhered to. Refer to *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Lain-Lain* [2007] 3 CLJ 557; [2007] 4 MLJ 585 (FC).

[18] In my view, what the applicant should have done was to file for the originating summons for the declaration sought before applying for the change in the identity card. The issue of whether the applicant is a male or remains a female is a complex issue and needs to be proven by evidence of witness. Even the authorities cited by both parties pertaining to this issue of change of gender were originating summons cases which of course have different consideration and effect as compared to judicial review matters. Further, being a complex issue, it is only prudent for the National Registration Department to impose such a condition.

Conclusion

[19] Based on the above, I do not find any error on the part of the respondent in rejecting the applicant's application. I believe, the respondent had acted reasonably legally and rationally, without procedural impropriety and *mala fide*; in rejecting the applicant's application for change of name and gender. I therefore dismiss this application with cost.